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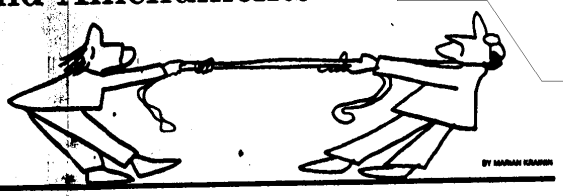
Don Wallace Jr. and Allan Gerson

The Dubious Boland Amendments



". . . it is, at best, questionable whether Congress has any right to prohibit the president and his staff from soliciting funds from private individuals and foreign governments."

Suppose President Reagan did in fact solicit, directly or indirectly, King Fahd to support the contras in Nicaragua. Suppose the president acted similarly with respect to other foreign leaders. Suppose also that Reagan gave the go-ahead to his White House staff to supervise fund raising for the contras by private organizations and individuals.

Aside from questions as to whether such behavior was dignified, was it constitutional? Was it lawful?

The past few weeks of Iran-contra hearings appear to have created the popular impression that such conduct is either unconstitutional or unlawful or both; that Congress, through the Boland Amendments, has authoritatively prohibited any aid "directly or indirectly" to the contras and that any contravention by the president or his men of the ban must have necessarily put them beyond their constitutional bounds.

But this misses the real and fundamental issue: whether Congress has authority under the Constitution to impose or to try to impose such curbs on the executive branch of government.

The battle over congressional versus executive powers in the making and execution of U.S. foreign policy has been going on since the founding of the republic. In the Iran-contra affair, the danger is that Congress, by concentrating on some of the minutiae of the contra aid program, is permitting itself to move away from addressing the larger policy issues, and in the process is doing damage to the popular understanding of the appropriate relationship between the executive and Congress as envisioned by the Constitution.

The confines of the constitutional debate have already been made clear. Those favoring strong congressional controls over presidential power have used the Iran-contra hearings to advocate the 17th-century English principle that the executive is not to resort to back-door financing—that is, is not to raise money except by legislation enacted by Congress, which principle is now contained in Section 9 of Article I of the Constitution. It provides that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." And they have pointed to the fact that under the Constitution, Congress has a very major role to play—it has the power to declare war, to regulate foreign commerce and the power of the purse.

By contrast, those favoring nearly unbridled presidential power in the foreign policy arena have pointed to the fact that the president is not merely in charge of day-to-day operations but alone makes policy by directing thousands of executive employees, including the secretary of state, assistant secretaries of state, ambassadors, generals, admirals and others every day of the week. The president alone meets with foreign heads of state. In this capacity, they ask, who is to—or may—prevent the president from exercising his will or influencing contributions through a presidential wink?

There is, in fact, no easy way to resolve these long-standing differences in views. This is because the Constitution, whatever its "original intent," has in practice provided for tension—sometimes creative and sometimes little more than a tug of war—between Congress and the executive in dealing with the national strategic interests of the United States.

At times this state of tension—what Justice Brandeis characterized as "the inevitable friction incident to the distribution of the governmental powers among three departments"—has proven a source of great frustration to Congress, as it has to the executive branch. In some instances, Congress has sought to force the issue by imposing its will. This is what happened when Congress tried to restrict the president's prerogatives as commander-in-chief by enacting the War Powers Act over President Nixon's veto. And this is what happened in an area related to the president's war powers, when Congress enacted the Boland Amendments.

But the constitutional validity of the War Powers Act still has to be tested in the U.S. courts. And this is equally true of the reach of the Boland Amendments.

The Boland Amendments seek to use Congress' powers to restrict the use of congressionally appropriated funds to place curbs on the president's freedom of action in foreign affairs: it prohibits the CIA, the Department of Defense "or any other agency or entity of the United States involved in intelligence activities" from "directly or indirectly" supporting the contras.

This may seem reasonable and constitutional on the face of it. But various U.S. Supreme Court and federal court decisions suggest otherwise. They suggest that whereas Congress has the power to "withhold" or not appropriate funds, once funds have been appropriated it does not have the power to "condition" how they will be spent if the effect is to emasculate constitutionally protected powers.

For example, Congress does not have the power to impinge on the conduct of other executive officials —say, the solicitor general), by linking appropriations to him to the positions he is to take in arguments before the U.S. Supreme Court. Congress must respect what the Supreme Court has referred to as the "great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result."

To be sure, it may seem to foreign leaders as if our government speaks with two voices. But, under the U.S. Constitution, it is at best questionable whether Congress has any right to prohibit the president and his staff from soliciting funds from private individuals and foreign governments for foreign causes to which Congress has refused to appropriate money. (Of course, where one draws the line between the president's men and those officials more directly subject to congressional controls is itself no easy task, but one good benchmark is whether they are appointed by the president to assist the president or appointed with the advice and consent of the Senate.)

In short, although this may shock some, it is questionable whether Congress, through its power over appropriated funds, can constitutionally stop President Reagan from seeking, by the solicitation of funds from abroad and otherwise, to advance the Reagan Doctrine; that is, support for "freedom fighters" in Nicaragua and elsewhere around the world.

Perhaps it would have been wiser or more seemly had the president stated his reservations about the aspects of the Boland Amendments at the outset. But the president might, quite reasonably, never have interpreted the statute as applying to him or his men. In any event, the constitutionality of legislation does not hinge on what the president does; it is what the courts declare that is determinative. The president's principle obligation is to uphold the Constitution; he need not, and indeed cannot (as courts do not provide advisory opinions), first get a judicial determination of constitutionality before deciding not to comply with a legislative provision. However, where possible, he should act to invite rather than hinder a judicial resolution of any outstanding constitutional issues.

It seems increasingly likely that the courts will be called upon to pass on the constitutional reach of the Boland Amendments, despite the hesitancy both Congress and the executive branch seem to exhibit about obtaining a judicial resolution of the matter. Although some courts have in the past also ducked deciding such issues as being "political" questions, in the current context an indictment (as seems probable) of Lt. Col. Oliver North for conspiracy to violate the Boland Amendments just might, if nothing else, force a judicial determination of their constitutional reach.

The "inevitable friction incident to the distribution of the governmental powers among three departments" has served this country well. Congressional efforts to chasten the president through legislative emasculation of his powers may only swing the pendulum of perceived presidential abuses of power in the opposite direction. A meaningful resolution of the constitutional dimensions of the current situation can only be achieved by bringing the powers of the third great institutional department—the judiciary—into play.

Until then it is best to recognize that the Iran-contra hearings can only raise these vital constitutional issues of separation of powers; they do not and cannot answer them.

Don Wallace Jr. is director of the International Law Institute at Georgetown University. Allan Gerson, a resident scholar at the American Enterprise Institute, was until recently deputy assistant attorney general and counselor for national security affairs.

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